80-940

No.

Supreme Court, U. S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LONE STAR STEEL COMPANY AND
UNITED MINE WORKERS OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
DAVID FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LONE STAR STEEL COMPANY AND
UNITED MINE WORKERS OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

Whether the Board properly concluded that a contract clause extending the collective bargaining agreement between the company and the union to mines subsequently acquired by the company, if the union is recognized or certified as the bargaining representative of the employees at those mines, is a mandatory subject of bargaining.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Reasons for granting the petition 3

Conclusion 5

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Allied Chemical Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 4

Amax Coal Co. v. *NLRB*, 614 F. 2d 872, petitions for cert. pending, Nos. 80-289 and 80-692 3-4

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(b)(3), 29 U.S.C. 158(b)(3) 2, 3

PREVIOUS PAGE WAS BLANK

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. This petition is conditioned either on the granting of the petition for a writ of certiorari filed by respondent Lone Star Steel Company in No. 80-716, which seeks review of the same judgment, or the granting of Question 2 of the petition for a writ of certiorari filed by the United Mine Workers of America, Local 1854, in No. 80-289, which seeks review of the judgment in *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980). The Board is filing briefs in response to both of those petitions. In the event that No. 80-716 and Question 2 of No. 80-289 are denied, the Board requests the Court to deny this petition as well.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29)[1] is not yet reported. The Board's decision and order (Pet. App. C1-C20) are reported at 231 N.L.R.B. 573.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provide:

> Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collec-

---

[1] "Pet. App." references are to the appendix to the petition in No. 80-716, in which the Company is seeking review of another part of the court of appeals' decision.

> tively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:
> * * *

STATEMENT

The Board found that the United Mine Workers of America ("the Union"), the representative of the employees of Lone Star Steel Company ("the Company") at its Starlight mine, called a strike because of the Company's refusal to agree to several provisions in the national contract between the Union and the Bituminous Coal Operators' Association. Among the clauses in dispute was the "application of contract" clause, which read (Pet. App. E5):

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

An addendum made clear that this clause would extend the contract only to facilities where the Union was recognized or certified as the employees' bargaining representative (Pet. App. C6).

Upon charges filed by the Company, the Board's General Counsel issued a complaint alleging, *inter alia*, that the "application of contract" clause was not a mandatory subject of bargaining, and that the Union therefore violated Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3), by striking

with regard to that clause. A divided Board held that the "application of contract" clause was a mandatory subject of bargaining because it "serves to protect the jobs and work mine by removing economic incentives which might otherwise encourage Lone Star to transfer such work to other mines under [the Company's] control" (Pet. App. C11). Accordingly, the Board concluded that the Union did not violate the Act by striking over this clause, and dismissed the complaint in this respect (Pet. App. C12).[2].

The court of appeals rejected the Board's view, holding that the "application of contract" clause was not a mandatory subject of bargaining, and that the Union's strike regarding the clause therefore violated Section 8(b)(3) of the Act (Pet. App. A23-A28). In the court's view, the clause was broader than necessary to protect unit employees against a shift of production to another mine with lower wages and inferior working conditions. The court observed that the clause would extend the agreement to coal preparation or production facilities to which unit work could not be transferred, and would require that all contract provisions, including non-economic provisions having no bearing on the employees' working conditions, be put into effect at those facilities (*id.* at A28). Accordingly, the court set aside the Board's order with respect to the "application of contract" clause and remanded the case for entry of an appropriate remedial order (*ibid.*).

REASONS FOR GRANTING THE PETITION

The question whether the "application of contract" clause is a mandatory subject of bargaining is also presented as Question 2 of the petition for a writ of certiorari in *United*

---

[2]The Board also found that the Union did not violate the Act in striking for a "successorship" clause (Pet. App. C6-C10). The court of appeals sustained the Board's findings in this regard (Pet. App. A8-A23), and the Company has filed a petition for certiorari to review that ruling. *Lone Star Steel Company* v. *NLRB, et al.*, No. 80-716. The Board intends to file an opposition to that petition.

Mine Workers of America, Local 1854 v. *NLRB*, No. 80-289, which seeks review of the judgment in *Amax Coal Co.* v. *NLRB*, 614 F. 2d 872 (3d Cir. 1980). In that case, the Third Circuit, like the court of appeals in this case, held that the identical "application of contract" clause is not a mandatory subject of bargaining. 614 F. 2d at 883-884. For the reasons explained in our brief in response to the petition in No. 80-289, the Board does not oppose certiorari on this issue, and it has filed this petition to preserve its position on the "application of contract" clause question in this case.[3] Accordingly, if the Court decides to review the "application of contract" clause issue in No. 80-289, the Court should dispose of this petition in light of its determination in No. 80-289.

In addition , if the Court decides to grant the Company's petition on the "successorship" clause question (No. 80-716), the Board believes that it would be appropriate to review the related "application of contract" clause question as well. It is settled that matters affecting individuals outside the bargaining unit are mandatory subjects of bargaining if they "vitally affect" the terms and conditions of employment of unit employees. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176, 178-179 (1971). The "application of contract" clause meets this test: it protects the unit employees' jobs, wages, and working conditions by ensuring that labor costs will be the same at any mine where the employees are represented by the Union. If labor costs were lower at another mine, because the employees there received lower pay or fewer fringe benefits, the Company might well transfer unit work there, thus depriving unit employees of their jobs. The "application of contract"

---

[3]In *Amax Coal*, the Board has filed its own petition for a writ of certiorari with respect to whether the management-appointed trustee of a jointly administered trust fund is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Laobr Relations Act, 29 U.S.C. 158(b)(1)(B). *NLRB* v. *Amax Coal Company*, No. 80-692.

clause seeks to protect the unit employees against such erosion of their working conditions. Contrary to the view of the court of appeals, the fact that the clause provides for extension of the non-economic, as well as the economic, provisions of the contract to both the Company's mining and non-mining facilities does not impair its status as a mandatory subject of bargaining. Moreover, because the contract becomes applicable at another facility only if the employees at that facility have first selected the Union as their representative, the Board correctly observed that the "application of contract" clause does not seek unlawfully "to promote the Union's institutional or organizational interests" (Pet. App. C12).

CONCLUSION

The petition for a writ of certiorari should be granted if the Company's petition in No. 80-716 is granted. If the petition in No. 80-716 is denied but the petition in No. 80-289 is granted as to Question 2, the Court should defer disposition of this petition pending its decision in No. 80-289.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
DAVID FLEISCHER
Attorney
National Labor Relations Board

DECEMBER 1980

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lone Star Steel Company, Petitioner,	)	
v.	)	No. 77-1667
National Labor Relations Board, Respondent,	)	
and	)	
United Mine Workers of America, Intervenors.	)	

JUDGMENT

Before: HOLLOWAY and BARRETT, Circuit Judges, and MILLER, Judge*

THIS CAUSE came on to be heard upon a petition filed by Lone Star Steel Company, to review an order of the National Labor Relations Board which dismissed the complaint against United Mine Workers of America, on August 24, 1977. The Court heard argument of respective counsel on March 12, 1979, and has considered the briefs and transcript of record filed in this cause. On July 28, 1980, the Court, being fully advised in the premises, issued its opinion sustaining in part and setting aside in part the order of the Board dismissing the complaint and remanding the case to the Board for further proceedings, all in accordance with the Court's opinion.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Tenth Circuit that this case be and it hereby is remanded to the Board for further proceedings, in accordance with the Court's opinion.

_____

Judge, United States Court of Appeals for the Tenth Circuit

Dated: September 12, 1980

---

*Honorable Jack Richard Miller, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.